

(4)
No. 90-1124

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KEITH JACOBSON,

Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 14, 1991
CERTIORARI GRANTED APRIL 22, 1991

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RELEVANT DOCKET ENTRIES

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

DATE	FILINGS/PROCEEDINGS
9-14-87	Indictment
4-19-88	Beginning of Trial
4-26-88	End of Trial
7-1-88	Judgment and Conviction
7-11-88	Notice of Appeal

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

2-13-89	Argument before the Panel
1-12-90	Panel Opinion
1-12-90	Judgment
1-23-90	Granting of Government's Motion to Extend Time for Filing Rehearing Petition
2-7-90	Filing of Rehearing Petition
4-20-90	Granting of Rehearing Petition
5-17-90	Argument before the En Banc Court
10-15-90	En Banc Opinion
10-15-90	En Banc Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CR 87-0-77
JUDGE BEAM

UNITED STATES OF AMERICA

Plaintiff,

vs.

KEITH M. JACOBSEN,
Defendant.

INDICTMENT
(18 U.S.C. § 2252)

[SEALED INDICTMENT]

[Filed Sep. 14, 1987]

The Grand Jury Charges:

COUNT I

On or about June 16, 1987, in the District of Nebraska, KEITH M. JACOBSEN knowingly received a visual depiction, that is: a magazine, the production of which involved the use of minors engaging in sexually explicit conduct and which magazine visually depicted minors engaged in sexually explicit conduct, which magazine had been mailed.

In violation of Title 18, United States Code, Section 2252.

A TRUE BILL:

/s/ Robert Sheppard
Foreman

/s/ Ronald D. Lahners
RONALD D. LAHNERS
United States Attorney

The United States of America requests that trial of this case be held at Omaha, Nebraska, pursuant to the rules of this Court.

/s/ Ronald D. Lahners
RONALD D. LAHNERS
United States Attorney

CAUTIONARY INSTRUCTION

THE COURT: * * * Ladies and gentlemen of the jury, at the conclusion of this case I will be giving you some written instructions on how you are to consider some of this evidence. This type of evidence that has just been offered is evidence that can be used by you for only certain limited purposes. Those purposes will be explained more fully in a written instruction. They are not to prove that the defendant committed the act with which he is charged in the indictment. This evidence is being received to show what the defendant's predisposition may or may not have been with respect to the receipt of material that falls within the definition of the statute. The definitions will be given to you also at the conclusion of this case so you don't need to be worried about what that definition is, but this evidence is received only for that purpose, to show what predisposition, if any, the defendant may have had towards the receipt of this type of material.

JURY INSTRUCTIONS

[524] "INSTRUCTION NUMBER 1

Now that you have heard the evidence and the arguments of counsel have been made, it is my duty to inform you of the legal principles and considerations you are to use in arriving at a proper verdict.

It is your duty to follow the law given you in this charge and to apply these rules of law to the *evidence* as you find them from the evidence."—I even can't read—"and to apply these rules of law to the facts as you find them from the evidence.

[525] You are not to single out one instruction alone as stating the law but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than given in these instructions, just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case and the reasonable inferences arising from such evidence.

INSTRUCTION NUMBER 2

At the outset I urge you to make every effort to reach an agreement in your deliberations. Inconclusive trials are not desirable. A common understanding among competent and intelligent people ought to be possible.

However, this observation must not be construed by any juror as a suggestion of the abandonment of an opinion held understandably and earnestly, just for the sake of agreement. The Court must never coerce agreements by jurors. It is appropriate to suggest that if you should find yourselves in apparent disagreement, each of you should carefully reexamine your opinions before assuming a position of dissent.

[526] However, each of you should, individually and of your own accord, decide for yourself upon the guilt or innocence of the defendant. You should, indeed, consult, discuss and deliberate with one another with a view to arriving at an agreement, if you may do so without the abandonment of your individual judgment. But you should not surrender a firm conviction respecting the guilt or innocence of the defendant, either out of deference to the opinion of your associates on the jury or for the sole purpose of returning a verdict. A verdict by this jury should reflect not only the common agreement of all of you but as well the individual judgment of each of you.

INSTRUCTION NUMBER 3

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You may also consider either direct or circumstantial evidence. 'Direct evidence' is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. 'Circumstantial evidence' is proof of a chain of facts and [527] circumstances indicating either the existence or non-existence of certain facts. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It requires only that you weigh all of the evidence and be convinced of the defendant's guilt beyond a reasonable doubt before he can be convicted.

INSTRUCTION NUMBER 4

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said or only part of it or none of it.

In determining the weight to be given to the testimony of the witnesses, you should take into consideration their interest in the result of the suit, if any appears, their conduct and demeanor while testifying, their apparent fairness or bias, their relationship to the parties, if any appears, their opportunities for seeing or knowing and remembering the things about which they testified, the reasonableness or unreasonableness of the testimony given by them, and all of the evidence, facts and circumstances proved which tend to corroborate or contradict such evidence, if any appear. You are not bound to take [528] the testimony of any witness as true and should not do so if you are satisfied from all the facts and circumstances proved at the trial that such witness is mistaken in the matter testified to or that for any other reason appearing in the evidence the testimony is untrue or unreliable.

The fact that one side may have used a greater number of witnesses or presented a greater quantity of evidence should not affect your decision. Rather, you should determine which witness or witnesses and which evidence appears accurate and trustworthy. It is the weight of the evidence that counts, not the number of witnesses.

The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for proof of any fact and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary if, after consideration of all of the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

The testimony of a law enforcement agent is entitled to no special weight. All persons who take the witness stand subject their testimony to the same examination

and the same tests as any other witness. You should not believe the testimony of a witness merely because the witness is a law enforcement agent.

[529] A defendant who wishes to testify is a competent witness and the defendant's testimony is to be judged in the same way as that of any other witness.

INSTRUCTION NUMBER 5

You are informed that the rules of evidence permit a law witness to give his testimony in the form of opinions and inferences, if those opinions or inferences are rightfully based on the perception of the witness and helpful to the clear understanding of his testimony or the determination of the fact in issue.

A witness who, by training and experience, has become an expert in any art, science, profession or calling may be permitted to state his or her opinion of the facts or data upon which the expert bases his or her opinion or inference as perceived by or made known to the expert at or before the hearing. An expert may give an opinion or inferences and reasons therefor without prior disclosure of the underlying facts or data unless the Court requires otherwise. You should consider such opinions received herein, either expert or from a lay witness, and give such opinions and inferences such weight as you think they deserve; and you may reject such opinions or inferences entirely if you conclude the reasons given in support of the opinion or inferences are unsound.

[530] INSTRUCTION NUMBER 6

As you have become aware during the course of this trial, this is a prosecution upon criminal accusations, instituted by and in the name of the United States of America, which is the sole plaintiff in this action. It is brought against Keith M. Jacobson and he is the only defendant in this action. Hereafter I may occasionally refer to the United States of America simply as 'the

plaintiff' or 'the government.' The defendant may be referred to as 'defendant' or by his proper or legal name.

INSTRUCTION NUMBER 7

The indictment charges as follows:

Count I: On or about June 16, 1987, in the District of Nebraska, Keith M. Jacobsen knowingly received a visual depiction, that is, a magazine, the production of which involved the use of minors engaging in sexually explicit conduct and which magazine visually depicted minors engaged in sexually explicit conduct, which magazine had been mailed.

In violation of Title 18, United States Code, Section 2252.

INSTRUCTION NUMBER 8

An indictment is only a formal method of accusing the defendant of a crime. It is not evidence of any kind against the defendant and the jury should not be influenced [531] in any way against the defendant because of an indictment returned against him.

The indictment charges that the offense involved was committed 'on or about' certain dates. It is not necessary that the proof establish with certainty the exact date of an alleged offense. It is sufficient if the evidence shows beyond a reasonable doubt that an offense was committed on a date reasonably near the date alleged.

The defendant is not on trial for any act or conduct not alleged in the indictment.

INSTRUCTION NUMBER 9

As to the charges contained in Count I of the indictment, there are three essential elements which the government must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crimes charged:

- 1) That the defendant knowingly received a visual depiction, that is, a magazine, depicting a minor engaging in sexually explicit conduct.

2) That the producing of the visual depiction involved the use of a minor engaged in sexually explicit conduct.

3) That the visual depiction had been sent in the United States mails.

[532] If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime charged in the indictment. On the other hand, if you find the government has failed to prove beyond a reasonable doubt any one or more of the foregoing essential elements, it is your duty to find the defendant not guilty of the crime charged.

INSTRUCTION NUMBER 10

A 'minor' means any person under the age of eighteen years.

'Sexually explicit conduct' means actual or simulated sexual intercourse including genital-genital, oral-genital, and anal-genital contact, whether between persons of the same or opposite sex; or actual or simulated masturbation; or lascivious exhibition of the genitals or pubic area.

'Producing' means producing, directing, manufacturing, issuing, publishing or advertising.

INSTRUCTION NUMBER 11

In determining whether a visual depiction of a minor constitutes a lascivious exhibition of genitals or pubic area, you may consider whether the focal point of the visual depiction is on the child's genitalia or pubic area, whether the setting of the visual depiction [533] is sexually suggestive, whether the child is depicted in an unnatural pose or in inappropriate attire, whether the child is fully or partially clothed or nude, whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity, and whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

INSTRUCTION NUMBER 12

If you find that any of the pictures of the magazine *Boys Who Love Boys* show minors engaged in sexually explicit conduct, you are instructed that the producing of the magazine '... involve(d) the use of a minor ...' as that phrase is used in the statute.

INSTRUCTION NUMBER 13

The 'knowing receipt' aspect of Element 1 of this offense requires the government prove beyond a reasonable doubt that the defendant knew the materials he was receiving were visual depictions of minors engaged in sexually explicit conduct. The government is not required to prove that the defendant knew that receipt of these materials was a violation of the law.

INSTRUCTION NUMBER 14

An act is done 'knowingly' if it is done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

[534] INSTRUCTION NUMBER 15

As mentioned, one of the issues in this case is whether the defendant was entrapped. If the defendant was entrapped he must be found not guilty. The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped.

If the defendant before contact with law-enforcement officers or their agents did not have any intent or disposition to commit the crime charged and was induced or persuaded by law-enforcement officers or their agents to commit that crime, then he was entrapped. On the other hand, if the defendant before contact with law-enforcement officers or their agents did have an intent or disposition to commit the crime charged, then he was not entrapped even though law-enforcement officers or their

agents provided a favorable opportunity to commit the crime or made committing the crime easier or even participated in acts essential to the crime.

INSTRUCTION NUMBER 15A

You have heard testimony that the defendant, Keith M. Jacobson, made a statement to Calvin Comfort. When you consider this evidence you must decide:

First, did the defendant, Keith M. Jacobson, in fact make the statement?

Second, if the defendant, Keith M. Jacobson, did [535] make such a statement, how much weight should you give to it?

In making those decisions you should consider all of the evidence, including the circumstances under which the statement may have been made. After you have reviewed these matters you may give such weight to the statement you feel it deserves.

INSTRUCTION NUMBER 15B

During this trial certain exhibits were received in evidence which were in possession of the defendant. These are Exhibits 14A, 18A and 18B. Possession of these exhibits is not evidence or proof that he committed the offense charged in the indictment.

You may, however, consider this evidence in determining whether the defendant was predisposed to the receipt of child pornography.

INSTRUCTION NUMBER 15C

You have heard testimony about the character and reputation of the defendant for truthfulness. You may consider this evidence only in deciding whether or not to believe the testimony of the defendant and how much weight to give to it.

INSTRUCTION NUMBER 15D

The defendant presented testimony of witnesses who say that his reputation is that he is law abiding. If you believe that the defendant is law abiding, this might [536] create a reasonable doubt in your mind as to whether he knowingly received a visual depiction of a minor engaging in sexually explicit conduct. You must decide whether to believe this evidence and how much weight to give it.

A person who testified about a defendant's reputation or who gives his opinion about a defendant may be asked whether he had heard or knows specific things about the defendant. If he answers 'Yes,' he may be asked to explain how these things have affected his opinion or the reputation of the defendant. If he answers 'No,' you may consider how this answer bears on what he has said, remembering that what is stated in a question is not evidence and should not be assumed to be true.

INSTRUCTION NUMBER 15E

The government has presented testimony of undercover agents involved in the investigation of this case. Indeed, much of the evidence that has been introduced was derived directly or indirectly from the use of these agents.

The undercover activity may take many forms including 'sting' operations. An agent does not violate any federal statute or rule by utilizing this investigative method. A solicitation, request or approach by law enforcement officials to engage in criminal activity, standing alone, is not an inducement. Law-enforcement officials may use stealth and deception in order to apprehend persons engaged in criminal activities provided that they merely afforded [537] opportunities or facilities for the commission of the offense to one predisposed or ready to commit it. Law-enforcement officials may properly make use of undercover operations in which they use false names, establish false business enterprises and give the appearance of being prepared to engage in illegal activities.

INSTRUCTION NUMBER 16

Intent rarely, if ever, can be proved by direct evidence. Intent is a mental process and it, therefore, generally remains hidden within the mind where it is conceived. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or committed.

Intent may, however, be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct. But before that intent can be inferred from such circumstantial evidence alone, it must be of such character as to exclude every reasonable conclusion except that the defendant had the required intent. It is for you to determine from all the facts and circumstances in evidence whether or not the defendant committed the offense or offenses alleged and whether at such time he had the intent required by these instructions. [538] If you have any reasonable doubt with respect to either, you must find the defendant not guilty.

INSTRUCTION NUMBER 17

The law presumes a defendant to be innocent of crime. Thus, the defendant although accused begins the trial with a 'clean slate'—with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a rea-

sonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to [539] a defendant for the law never imposes upon a defendant in a criminal case the burden or duty of calling witnesses or producing any evidence. There is no burden upon a defendant to prove that he is innocent.

So if the jury after careful and impartial consideration of all the evidence in the case has a reasonable doubt that the defendant is guilty of a charge, it must acquit. If the jury views the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilty—the jury should of course adopt the conclusion of innocence.

INSTRUCTION NUMBER 18

During the trial I have ruled on objections to certain evidence. You must not concern yourselves with the reason for such rulings since they are controlled by rules of law.

You must not speculate or form or act upon any opinion as to how a witness might have testified in answer to questions which I have rejected during the trial or upon any subject matter to which I have forbidden inquiry.

In coming to any conclusion in this case you must be governed by the evidence before you and by the evidence alone.

You have no right to indulge in speculation, conjecture or inference not supported by the evidence.

[540] The evidence from which you are to find the facts consists of the following: (1) the testimony of the witnesses; (2) documents and other things received as

exhibits; and (3) any facts that have been stipulated—that is, formally agreed to by the parties.

The following things are not evidence: (1) statements, comments, questions and arguments by lawyers for the parties; (2) objections to questions; (3) any testimony I told you to disregard; and (4) anything you may have seen or heard about this case outside the courtroom.

INSTRUCTION NUMBER 19

In the trial of this case and in this charge I have in no way attempted to express my opinion as to who should prevail upon the issues submitted to you. You must not construe any statement, action or ruling on my part in the trial of this case as an indication of any opinion on my part respecting the proper course of your verdict. During the course of a trial I occasionally ask questions of a witness in order to bring out facts not fully covered in the testimony. Do not assume that I hold any opinion on the matters to which the questions related.

So regardless of what I may have chosen to say I must admonish you that you are the sole judges of the facts and your verdict must respond to your own conclusions from the evidence.

[541] INSTRUCTION NUMBER 20

You must disregard entirely any personal sympathy which you may have or feel for the defendant, Keith M. Jacobson. Likewise, however, you must entirely disregard and be uninfluenced by any inclination toward a personal prejudice against the defendant. You must determine this case solely upon the evidence before you and the law as now given you in this charge.

INSTRUCTION NUMBER 21

You have nothing whatever to do with the punishment of the defendant in the case of his conviction. Therefore, in determining his guilt or innocence you have no right

to take into consideration what punishment, if any, he may or may not receive in the event of his conviction.

INSTRUCTION NUMBER 22

In accordance with the oath which each of you took when you were selected as jurors to try this case, it is your duty to determine the disputed issues of fact in this case from the evidence produced and seek thereby to reach a verdict which shall speak the truth of the case and thereby do justice between the parties hereto, uninfluenced by sympathy, favor, affection or prejudice for or against any party. As I have already informed you, you are bound to receive and accept as correct the law as given you in this charge and you are not privileged to entertain an opinion as to the law or what [542] the law should be which conflicts in any respect with the law as stated in this charge. However, I have not attempted to embody all the law applicable to this case in any one of the instructions contained in this charge and, therefore, you must consider the charge in its entirety, giving due weight to each instruction and construing each instruction in the light of and in harmony with the other instructions, and so apply the principles set forth to all of the evidence received during the trial."—

* * * *

[543] INSTRUCTION NUMBER 23

Upon retiring to the jury room you shall first select one of your number as a foreperson to preside over your deliberations and who alone will sign your form of verdict. You will then proceed immediately with your study of and deliberations of the case.

In arriving at your verdict remember it must be unanimous. Short of unanimity, you cannot consider that you have reached a verdict.

You will take with you a blank form of general verdict which will adequately reflect your verdict.

After you have arrived at your verdict regarding the indictment against the defendant, your foreperson will simply write either the word 'guilty' or the words 'not guilty' in the blank space provided in the form of verdict for each [544] count of the indictment.

Your foreperson will then date and sign this form of verdict and when so completed it will constitute your verdict.

You will be allowed to separate for your meals and for any necessary intermission between 5:00 p.m. today and tomorrow morning at 9:00 o'clock a.m.

If it becomes necessary during your deliberations to communicate with the Court, your foreperson may send a written note by the Marshal. Never attempt to communicate with the Court by any means other than a signed writing. And bear in mind that you are not to reveal to the Court or to any person how the jury stands, numerically or otherwise, until you have reached a unanimous verdict.

In addition you are to keep in mind all of the earlier admonitions of the Court and especially to refrain from any discussion of the case with anyone and to avoid reading or viewing any news about this case.

As the Judge presiding over the trial I shall be available in this building throughout your deliberations and until your verdict has been returned and shall receive it promptly upon its return."

* * * *